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SERVICE DATE – APRIL 18, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 664 (Sub-No. 3)

REVISIONS TO THE COST-OF-CAPITAL COMPOSITE RAILROAD CRITERIA

Decided: April 12, 2017

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: To better reflect the current marketplace, the Surface Transportation Board (Board) is proposing to update one of the screening criteria used to create the “composite railroad” for the Board’s annual cost-of-capital determination. Specifically, the Board proposes that one of its screening criteria now require a company’s stock to be listed on either the New York Stock Exchange (NYSE) or the Nasdaq Stock Market (NASDAQ), rather than be listed on either the NYSE or American Stock Exchange (AMEX), as the AMEX is no longer in existence.

DATES: Comments are due by May 18, 2017. Reply comments are due by June 19, 2017.

ADDRESSES: Comments and replies may be submitted either via the Board’s e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board’s website, at <http://www.stb.gov>. Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: Docket No. EP 664 (Sub-No. 3), 395 E Street, S.W., Washington, DC 20423-0001. Copies of written comments and replies will be available for viewing and self-copying at the Board’s Public Docket Room, Room 131, and will be posted to the Board’s website.

FOR FURTHER INFORMATION CONTACT: Amy C. Ziehm, (202) 245-0391. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION: One of the Board’s regulatory responsibilities is to determine annually the railroad industry’s cost of capital. The cost-of-capital figure represents the Board’s estimate of the average rate of return needed to persuade investors to provide capital to the freight rail industry. This figure is an essential component of many of the Board’s core regulatory responsibilities.

The Board calculates the cost of capital as the weighted average of the cost of debt and the cost of equity, with the weights determined by the railroad industry's capital structure (the fraction of capital from debt or equity on a market-value basis). See Methodology to be Employed in Determining R.R. Indus.'s Cost of Capital, EP 664, slip op. at 6 (STB served Jan. 17, 2008). The Board determines the railroad industry's cost of capital for a "composite railroad," which is based on data from a sample of railroads. Pursuant to Railroad Cost of Capital—1984, 1 I.C.C.2d 989 (1985), the sample includes all railroads that meet the following criteria:

- The company is a Class I line-haul railroad;¹
- If the Class I railroad is controlled by another company, the controlling company is primarily a railroad company and is not already included in the study frame;²
- The company's bonds are rated at least BBB by Standard & Poor's and Baa by Moody's;
- The company's stock is listed on either the NYSE or the AMEX; and
- The company has paid dividends throughout the review year.

1 I.C.C.2d at 1003-04; see also R.R. Cost of Capital—2015, EP 558 (Sub-No. 19), slip op. at 3 (STB served Aug. 5, 2016).

Proposed Rule

The Board proposes to revise the fourth screening criterion, which currently requires that a company's stock be listed on either the NYSE or the AMEX. The AMEX was acquired in October 2008 by NYSE Euronext, a now defunct Euro-American multinational financial services corporation that operated multiple securities exchanges. As a result, the Board's screening criteria used to determine the composite railroad should be updated to reflect the current marketplace. The Board therefore proposes that the fourth screening criterion be amended to remove the AMEX listing and instead require that a company's stock be listed on either the NYSE or the NASDAQ, the primary competitor to the NYSE.

The NASDAQ is a robust and reputable stock exchange, and the Board believes that it is a suitable replacement for the AMEX in the cost-of-capital determination. The NASDAQ is the

¹ For the definition of a Class I railroad, see fn. 4, *infra*.

² A company is considered to be primarily in the railroad business if at least 50% of its total assets are devoted to railroad operations. Railroad Cost of Capital—1984, 1 I.C.C.2d at 1003-04.

world's second-largest stock exchange, behind only the NYSE, and the NYSE and NASDAQ combined account for the major portion of all equities trading in North America. When the Board's predecessor adopted the fourth screening criterion, it did so to "insure the availability of stock price data." Railroad Cost of Capital—1984, 1 I.C.C.2d at 1004. By requiring applicable carriers to trade on either the NYSE or the NASDAQ, the Board would ensure the availability of stock price data for use in the Board's computation of the rail industry's cost of capital.³ Therefore, the Board seeks public comment on its proposal to require the listing of a company's stock on either the NYSE or the NASDAQ for a railroad to be included in the composite group to determine the industry's cost of capital.

Regulatory Flexibility Act. The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. §§ 601-612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. §§ 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, § 603(a), or certify that the proposed rule would not have a "significant impact on a substantial number of small entities." § 605(b).

Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. White Eagle Coop. Ass'n v. Conner, 553 F.3d 467, 478, 480 (7th Cir. 2009).

This proposal will not have a significant economic impact upon a substantial number of small entities within the meaning of the RFA. A change in the listing requirement for inclusion in the composite railroad does not have a significant economic impact on the railroads included; likewise, whether or not a railroad is included in the composite group has no significant economic impact on that individual railroad. The proposed rule would therefore have no significant impact on small railroads (small entities).⁴

³ For its 2015 cost of capital calculation, the Board waived its requirement that a company's stock be listed on either the NYSE or the AMEX, noting that CSX Corporation (CSX) transferred its stock exchange listing from the NYSE to the NASDAQ in 2015. R.R. Cost of Capital—2015, EP 558 (Sub-No. 19), slip op. at 2 n.5 (STB served Mar. 10, 2016).

⁴ Effective June 30, 2016, for the purpose of RFA analysis for rail carriers subject to our jurisdiction, the Board defines a "small business" as a rail carrier classified as a Class III rail carrier under 49 C.F.R. § 1201.1-1. See Small Entity Size Standards Under the Regulatory Flexibility Act, EP 719 (STB served June 30, 2016) (with Board Member Begeman dissenting). Class III carriers have annual carrier operating revenues of \$20 million or less in 1991 dollars, or \$36,633,120 or less when adjusted for inflation using 2015 data. Class II carriers have annual

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Paperwork Reduction Act. The Board's proposal does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1995, 44 U.S.C. §§ 3501-3521.

It is ordered:

1. Comments are due by May 18, 2017. Reply comments are due by June 19, 2017.
2. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.
3. Notice of this decision will be published in the Federal Register.
4. This decision is effective on its service date.

By the Board, Board Members Begeman, Elliott, and Miller.

(. . . continued)

carrier operating revenues of less than \$250 million but in excess of \$20 million in 1991 dollars, or \$457,913,998 and \$36,633,120 respectively, when adjusted for inflation using 2015 data. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds on its website. 49 C.F.R § 1201.1-1.